No. 528.

# In the Supreme Court of the United States.

October Term, 1920.

THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,
*v.*
BOSE YOSHIKAWA AND CORNIA BOSE YOSHIKAWA.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.*

BRIEF FOR THE UNITED STATES.

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## AUTHORITIES CITED.

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## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

The defendants were indicted for violation of Revised Statutes, sections 3257, 3279, 3281, and 3282. The indictment is in four counts. The first count, based upon Revised Statutes, section 3257, charges that the defendants, on April 23, 1920, within the jurisdiction of the court, "did feloniously, knowingly, and unlawfully engage in carrying on the business of distillers * * * and while so engaged as aforesaid did then and there distill a large quantity of spirits * * * then and there subject to the internal revenue tax then imposed by law upon distilled spirits; and that * * * the

defendants aforesaid did then and there feloniously, unlawfully, and knowingly defraud and attempt to defraud the said United States of the said tax on the said spirits so by them distilled as aforesaid." (R. 3.)

The second count, based on Revised Statutes, section 3279, charges that the defendants at the same time and place "did unlawfully, knowingly, wilfully, and feloniously fail to place and keep conspicuously, or at all, on the place of business conducted by them, the said defendants; that is to say, a business, to wit, a distillery for the production of spirituous liquor, any sign exhibiting in plain and legible letters, or at all, the name or firm of the distiller with the words 'Registered Distillery' as required by law." (R. 4.)

The third count, based upon Revised Statutes, section 3281, charges that the defendants at the same time and place "did wilfully, knowingly, unlawfully, and feloniously carry on the business of distillers within the intent and meaning of the internal revenue laws of the United States without having given bond as required by law." (R. 4.)

The fourth count, based on Revised Statutes, section 3282, charges that the defendants at the same time and place "did wilfully, knowingly, unlawfully, and feloniously make and ferment a certain mash, fit for distillation, a more particular description of the quantity and quality of the mash being to the grand jurors unknown, in a certain building not then and there a distillery duly authorized according to law."

The court sustained defendants' motion to quash and demurrer (R. pp. 7–9) on the ground that it appeared on the face of the indictment that the alleged crimes were committed after the National Prohibition Act had gone into effect, and that therefore the statutes on which the indictments were based had been repealed.[1] (266 Fed. 746.)

Whether the court erred in so doing is the only question which is open to consideration on this writ of error.

## ARGUMENT.

### I. The Statutes on Which the Indictment is Based were not Repealed by the National Prohibition Act.

#### (A) The Provisions of the Revenue Laws Stated.

By title 35, chapter 4, of the Revised Statutes, and subsequent acts, a tax is imposed on all distilled spirits produced within the United States of $1.10 on each proof gallon or wine gallon, when below proof, which attaches to the spirits as soon as they are produced; and for the purpose of enforcing the collection of the tax the business of producing distilled spirits is placed under strict Government supervision. It is provided that every person engaged in or intending to engage in the business of distilling spirits must give notice of such intention to the internal revenue collector of the district wherein such business is to be carried on (R. S., sec. 3259), and must, before proceeding with such business and

[1] The relevant sections of the Revised Statutes and of the National Prohibition Act are reprinted in an appendix attached hereto.

on May 1 of each succeeding year, execute a bond in the form prescribed by the Commissioner of Internal Revenue conditioned that he shall comply with the provisions of law relating to the duties and business of distillers. (R. S., sec. 3260.)

No vessel to be used for the purpose of distilling shall be set up without the permit in writing of the collector (R. S. sec. 3265), and every still must be registered with the collector immediately upon being set up (R. S., sec. 3258); the distiller must keep conspicuously on his distillery a sign showing the name or firm of the distiller with the words "Registered Distillery" (R. S., sec. 3279); and the making or fermenting of a mash, wort or wash fit for distillation or for the production of spirits or alcohol in any building or on any premises other than a distillery duly authorized according to law is prohibited (R. S., sec. 3282).

The distiller must cause to be made an accurate plan and description of the distillery and distilling apparatus and file it with the collector and Commissioner of Internal Revenue (R. S., sec. 3263); thereupon the collector makes a survey of the distillery and estimates its producing capacity (R. S., sec. 3264).

All spirits must be conveyed into receiving cisterns, from which they must be drawn into casks, which are thereupon gauged, proved, and marked by an internal revenue gauger, and immediately removed under the care of a Government storekeeper into the distillery warehouse, which the distiller is required to keep upon his premises, where

they are numbered by serial numbers and have attached stamps with the number of proof gallons of spirits contained therein written thereon. (R. S., secs. 3267, 3271, and 3287, as amended.) The amount of the tax then becomes fixed and determined, and the distiller is required to give bond to pay the tax and remove the casks within eight years. (R. S., sec. 3293, as amended, and sec. 49 of the act of Aug. 27, 1894.) The removal of the spirits from the distillery to any other place than the warehouse without paying the tax thereon is prohibited. (Sec. 3296.)

The distiller must make daily entries, in books kept for that purpose, of the grain and other materials used in the manufacture of spirits, and must render a sworn statement each month of the number of gallons produced by him and placed in his warehouse (R. S., secs. 3303 and 3307). The collector must determine whether the distiller has accounted in his returns for the preceding month for all the spirits produced by him. If the collector decides that he has not done so he may assess him upon the deficiency. In no case shall the distiller be assessed for a less amount of spirits than 80 per cent of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent he shall also be assessed upon the excess (sec. 3309). The obvious purpose of this and many other provisions of a similar nature was to prevent the secret production of spirits and consequent evasion of the tax. For failure to comply with

these requirements and for defrauding or attempting to defraud the United States of the tax on the spirits distilled by him the distiller is liable to severe punishment by fine and imprisonment.

B. The Sections under Consideration are not Inconsistent with the National Prohibition Act.

Title II, section 35, of the National Prohibition Act provides that "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws."

Now, the revenue laws can be said to be inconsistent with the National Prohibition Act only in so far as they interfere with its enforcement. In so far as their enforcement is an aid to the enforcement of the National Prohibition Act it can not be said in the face of the express provision of title II, section 35, that the latter act repeals them.

We have seen that the purpose of the revenue laws was to determine the amount of the tax which should be paid on distilled spirits, the manner in which it should be assessed, how and when it should be paid, and to prevent its evasion and enforce its collection. The purpose of the National Prohibition Act was to prohibit the production of all intoxicating liquors, including distilled spirits, without a permit from the Commissioner of Internal Revenue.

It provides in title II, section 35, that "this act shall not relieve *anyone* from paying any tax or other charges imposed upon the manufacture or traffic in such liquor." Unquestionably this provision refers to the internal revenue taxes imposed upon intoxicating liquors at the time the National Prohibition Act went into effect. Clearly spirits distilled under permit are subject to such tax.

Literally the provision that the act shall not relieve *anyone* from paying the tax imposed on the manufacture of intoxicating liquor applies whether the liquor is manufactured with or without a permit. But it has been argued that this provision should not be construed as subjecting spirits produced without a permit to a tax because there is such inconsistency between taxing an article and prohibiting its production that Congress could not have intended to do both; in other words, that the provision prohibiting the production of distilled spirits without a permit in inconsistent with the intention to tax such spirits when produced without a permit, and therefore the National Prohibition Act repealed the revenue laws, at least as applied to spirits distilled without a permit.

It has frequently been ruled that there is no inconsistency between taxing an article and prohibiting its production entirely. In the *License Tax Cases*, 5 Wall. 462, it was held that a person could be convicted for retailing liquors without a Federal license and selling lottery tickets without having paid the

special tax imposed by Federal law, although such acts were entirely prohibited under the laws of the States in which they were committed. This court said that there was nothing hostile or contradictory between the Federal and State legislation. The granting of a license was merely a form of imposing a tax. What the States prohibited the Federal Government discouraged by taxation. Both lines of legislation tended to the same result.

In *Foster* v. *Speed*, 120 Tenn. 470, it was held that the statute making the sale of intoxicating liquors a privilege and imposing a tax upon those engaged in that business was not repealed pro tanto by the law entirely prohibiting the sale of liquors within four miles of a schoolhouse. It was held that the two statutes were consistent and tended to effect the same purpose—viz, the prevention of the sale of liquor within four miles of a schoolhouse—and that anyone selling liquor within such territory must pay the tax imposed by the former law.

To the same effect see *Cooley on Taxation*, third edition, page 14; *Youngblood* v. *Sexton*, 32 Mich. 406.

In *Conwell* v. *Scars*, 65 Ohio st. 49, it was held that R. S., sections 4364–69, which provided, without exception or limitation, for the assessment of a tax upon the business of trafficking in intoxicating liquors, applied to such traffic, though carried on in violation of a municipal ordinance.

A similar question arose in the case of *State* v. *Moeling*, 129 La. Ann. 204. In that case the de-

fendant was indicted under a statute which provided that "whoever shall keep a grog or tippling shop, or retail spirituous liquor, without previously obtaining a license from the police jury, town, or city authorities, on conviction shall be fined," etc.

The defendant moved to quash the indictment on the ground that the prohibition and local option laws were in effect in the parish where the offence was alleged to have been committed, and that the police jury had not imposed and had no authority to impose any tax or license for the keeping of a grog or tippling shop or the retailing of spirituous and intoxicating liquors.

The motion was overruled, and the Supreme Court in affirming the judgment said:

> If it be a violation of the law to keep a grog or tippling shop, or to sell intoxicating liquor without a license in a place where a license might be obtained, *a fortiori* is it a violation of the law to keep such a shop or sell such liquor in a place where the law prohibits both the doing of those things without a license and the issuance of any license therefor. (Citing *State* v. *Kuhn*, 24 La. Ann. 474; *State* v. *Brown*, 41 La. Ann. 771, 6 So. 638; *State* v. *Gray*, 111 La. 853, 35 So. 952.)

In *Carpenter* v. *State*, 120 Tenn. 586, the court said:

> The contention of the plaintiff in error is that since the four-mile law, prohibiting the sale of intoxicating liquors within four miles of a schoolhouse where a school is kept, and making such sale a misdemeanor, applied to the town of

> Somerville, the statute requiring those dealing in intoxicants to pay a privilege tax, and making the sale without license to exercise such a privilege a misdemeanor, as provided in chapter 161, page 309, of the acts of 1899, do not apply to that territory; in other words, that *one can not be required to take out a license to do a thing, or punished for failure to take out such license, when the business proposed to be done is prohibited by law.*
>
> *This contention can not be sustained.* The business of retailing liquors in any part of the State, whether it be where they can be lawfully sold or where the sale is prohibited by the four-mile law, is made a privilege and taxed, and anyone engage in this business, although in violation of the latter law, is liable for this tax.

To the same effect are *Webster* v. *Commonwealth*, 89 Va. 154; *State* v. *Smiley*, 101 N. Ca. 709; *State* v. *Smith*, 126 N. Ca. 1057.

In Massachusetts it has been held that although the eighteenth amendment and the National Prohibition Act repealed the State laws in regard to intoxicating liquors in so far as they authorized the granting of licenses for the sale of such liquors, it did not repeal them in so far as they prohibited the selling of intoxicating liquors without a license. (*Commonwealth* v. *Nickerson*, 128 N. E. 273.)

Applying the principle of these cases to the case at bar, it is clear that the provision of title II, section 35, of the National Prohibition Act that the act shall not relieve anyone from paying the internal revenue tax imposed upon distilled spirits, should be construed to

mean that the tax must be paid upon such spirits even though they are distilled without a permit. That is its literal meaning and the one best calculated to effect the purposes of the act. In view of the provision of title II, section 3, that "all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," that is the construction which must be adopted.

The court below, while admitting that spirits distilled without a permit were subject to an internal-revenue tax, was of the opinion that, for failure to pay the tax, the distiller must be proceeded against under the National Prohibition Act, not the Revised Statutes. This contention is obviously unsound. The provision of title II, section 35, that "no liquor revenue stamps nor tax receipts for any illegal manufacture or sale shall be issued in advance," does not prohibit the collector of internal revenue from receiving the tax when tendered to him in accordance with the provisions of the revenue laws, but merely prohibits him from affixing stamps to the containers when the spirits have been distilled illegally.

The purpose of the provision that "upon evidence of such illegal manufacture or sale the tax shall be assessed against and collected from the person responsible for such illegal manufacture or sale, in double the amount now provided by law," is merely to confer upon the Commissioner of Internal Revenue that power to assess taxes where they have not been paid in the manner provided by law, which was con-

ferred upon him by Revised Statutes, section 3182 generally, and by Revised Statutes, section 3253, where distilled spirits are removed from the place where they were distilled without paying the tax upon them and without being deposited in a bonded warehouse. This power does not come into existence until after the distiller has failed to perform his duty with regard to paying the tax on distilled spirits as defined by other laws.

But the National Prohibition Act contains no provision as to the amount of the tax, nor how it shall be assessed, nor how or when it shall be paid, nor any measures to prevent its evasion. It is obvious, therefore, that for direction on all these matters the revenue laws must be looked to. Those laws provide that the tax must be paid on or before the removal of the spirits from the distillery unless they are deposited in the warehouse, when the tax must be paid before they are withdrawn from the warehouse and within eight years from the original entry for deposit. If the tax is not paid when it is due, the United States is defrauded and the distillers subjected to the penalties provided in Revised Statutes, section 3257. The cases cited above show that one may be punished for failure to pay a tax imposed upon an article the production of which is prohibited. This statute is, therefore, still in force, and the first count, which is based upon it, is good.

The other three counts are based upon provisions of the revenue laws which were designed to prevent the secret production of distilled spirits and conse-

quent evasion of the tax on them. Such, for instance, is the provision that no one shall be permitted to carry on the business of producing distilled spirits unless he executes annually a bond conditioned that he shall comply with the provisions of law relating to the duties and business of distillers. (R. S., sec. 3260.) For failure to comply with these provisions heavy penalties are imposed by Revised Statutes section 3281, upon which the third count of the present indictment is based. Such also are the provisions that every person having in his possession or custody a still shall register the same with the collector (R. S., sec. 3258), and every person engaged in distilling spirits shall keep conspicuously on his distillery a sign showing the name or firm of the distiller, with the words "registered distillery" (R. S., sec. 3279); and the provision that no mash, wort, or wash fit for distillation or for the production of spirits or alcohol shall be made or fermented in any building or in any premises other than a distillery duly authorized by law. (R. S., sec. 3282.) The second and fourth counts of the indictment are based on the last two of these statutes.

The prevention of the secret distillation of spirits is as necessary to the prevention of their distillation without a permit as it is to prevent the evasion of the Government tax on such spirits, and measures calculated to prevent such secret distillation do not interfere with but, on the contrary, are of material assistance in carrying out the purpose of the National Prohibition Act. It will not be contended that the sec-

tions here involved are actually inconsistent with any of its provisions. The failure of the National Prohibition Act to provide any means of preventing the evasion of the tax which under its terms is imposed upon distilled spirits shows that they were intended to be continued in force. Therefore the last three counts, which are based upon these statutes, are also good.

### C. The National Prohibition Act Does Not Impliedly Repeal the Revenue Laws.

It may be argued, however, that although the revenue laws are not actually inconsistent with the National Prohibition Act, they are repealed by it because it covers the whole subject matter of the revenue laws and contains provisions plainly showing that it was intended as a substitute for those laws.

This contention is clearly unsound. The National Prohibition Act does not provide a substitute for the system of Government supervision of the production of distilled spirits established under the revenue laws. The only change which it makes in that respect is that since the act came into effect no distilled spirits can be produced at all except when authorized by a permit issued by the Commissioner of Internal Revenue, and then only in accordance with regulations prescribed by him and by other provisions of the act, none of which are in conflict with the provisions of the revenue laws. This is a necessary deduction from the fact that

under the National Prohibition Act all distilled spirits, whether produced with or without a permit, are subject to an internal revenue tax.

It has already been pointed out that that act contains no provision as to the amount of the tax, nor how it shall be assessed, nor how or when it shall be paid, nor measures to prevent the evasion of the tax. Provisions as to all these matters are just as necessary since as before the National Prohibition Act, and for directions as to them the revenue laws must be looked to. That is the subject of those laws, and a subject which is not covered by the National Prohibition Act at all.

Under these circumstances it is clear that, in the absence of any provision on the subject, the revenue laws would remain in force, except in so far as they are inconsistent with the National Prohibition Act. To remove all doubt on the subject that act provides that "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws." Since the act expresses the extent to which it was intended to repeal prior laws, the rule that, where a later act covers the same subject matter as a prior one, it operates as an implied repeal of such prior act, would have no application, even if the National Prohibition Act did cover the same subject matter as the revenue laws. *United States* v. *Claflin*, 97

U. S., 546; *Henderson's Tobacco,* 11 Wall., 652; *Great Northern Ry. Co.* v. *United States,* 155 Fed., 945, 953, affirmed in 208 U. S., 452.

D. The Offenses Denounced by the Revenue Laws Are Not the Same as Those Denounced by the National Prohibition Act.

It may be argued, however, that although the provisions of the revenue laws are not actually inconsistent with those of the National Prohibition Act, an intention to repeal the former must be presumed because the penalties embraced by the later statute are lighter than those imposed by the earlier one for the same offenses. But this presumption applies only where the offenses denounced by both statutes are the same. It does not apply if each offense embraces an element not embraced in the other, as is the case here.

A person who distills spirits without filing a bond with the collector of internal revenue or keeping on his distillery a sign having thereon the name of the distiller with the words "registered distillery," or who makes a mash on premises not authorized as a distillery according to law, or who fails to pay, when due, the tax on distilled spirits produced by him, commits an offense against the revenue laws even though he has a permit from the Commissioner of Internal Revenue for distilling spirits, but he does not violate the National Prohibition Act; and if he distills spirits without a permit from the Commissioner of Internal Revenue he violates

the National Prohibition Act, though he may not offend against the revenue laws.

Therefore the argument that the National Prohibition Act repeals the revenue laws because it imposes lighter penalties than the earlier acts for the same offenses must be rejected as unsound; and for the same reason the argument must be rejected that to the extent that the National Prohibition Act denounces the same acts as those described in the revenue laws the latter must be held to have been repealed, as otherwise there would be an imposition of different penalties and punishments for the same offense contrary to the fifth amendment. It is true that under some circumstances the same act may constitute a violation of both statutes, but since the offenses denounced by the revenue laws are not the same as those denounced by the National Prohibition Act a person committing such an act may be prosecuted under both statutes. *Carter* v. *McClaughry*, 183 U. S. 365, 394; *Gavieres* v. *United States*, 220 U. S. 338; *Ebeling* v. *Morgan*, 237 U. S. 625.

The National Prohibition Act shows clearly the intention that a prosecution under it should not be a bar to prosecution for the same act if that act also constitutes an offense under the revenue laws, for it provides in title II, section 35: "Nor shall this act relieve any person from any liability, civil or criminal, heretofore or *hereafter* incurred under existing laws."

## E. The Decisions of the Lower Courts Sustain the Government's Contentions.

The district courts have a number of times had occasion to consider the question whether and to what extent the National Prohibition Act repeals the revenue laws. In some cases their decisions have been adverse to the contentions of the Government. *United States* v. *Windham*, 264 Fed. 376; *United States* v. *Puhac*, 268 Fed. 392; *United States* v. *Stafoff*, 268 Fed. 417.

But in three well-considered cases the contentions here presented have been sustained. In *United States* v. *Sohm*, 265 Fed. 910, it was held that the National Prohibition Act did not repeal Revised Statutes, sections 3258, 3260, and 3282. In *United States* v. *One Essex Touring Automobile*, 266 Fed. 138, it was held that distilled liquors, whether produced under permit for lawful purposes or in violation of law, are still "a commodity in respect whereof a tax is imposed" within the meaning of Revised Statutes, section 3450, providing for the forfeiture of vehicles used for the removal, deposit, or concealment of such articles with intent to defraud the United States of the tax, and that that section was not inconsistent with the National Prohibition Act. In *United States* v. *Turner*, 266 Fed. 248, it was held that the National Prohibition Act did not repeal Revised Statutes, section 3296, which prohibits the removal of any distilled spirits on which the tax has not been paid to a place other than a

distillery warehouse provided by law and the removal of such spirits from a warehouse in any manner other than that provided by law.

### CONCLUSION.

The internal revenue laws provide the regulations under which distilled spirits may lawfully be produced. The underlying purpose is not to restrict or even to discourage production but to insure the collection of the taxes on all that may be produced. These laws apply to all distilled spirits without regard to the purpose for which they are produced.

The National Prohibition Act does not absolutely prohibit the production of distilled spirits. It only prohibits their production *for beverage purposes* and adds another regulation—the obtaining of a permit—to govern their production for nonbeverage purposes.

The two laws are clearly supplementary and not inconsistent. The Government still imposes a tax on every gallon produced for any purpose and makes compliance with the provisions of the internal revenue laws necessary. Distilled spirits can not be lawfully produced except as the law has heretofore provided with the additional requirement of a permit. If the production is for nonbeverage purposes, the producer commits a new and distinct offense. Neither a compliance with the revenue laws nor obtaining a permit to manufacture for nonbeverage purposes will protect him from punishment for this offense.

It is respectfully submitted, therefore, that the judgment of the district court was erroneous and should be reversed and the cause remanded.

ANNETTE ABBOTT ADAMS,
*Assistant Attorney General.*
LEONARD B. ZEISLER,
*Special Assistant to the Attorney General.*
FEBRUARY, 1921.

## APPENDIX.

Revised Statutes, section 3257: Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Revised Statutes, section 3279: Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, or wholesale dealer, with the words "registered distillery," "rectifier of spirits," or "wholesale liquor dealer," as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of five hundred dollars. * * *

Revised Statutes, section 3281: Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits

distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. * * *

Revised Statutes, section 3282: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. * * *

## The National Prohibition Act.

### *Title II.*

Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act; and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only

as herein provided; and the commissioner may, upon application, issue permits therefor. * * *

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do.

All permits to manufacture, prescribe, sell, or transport liquor may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this act or laws now in force after August 31 in any year to December 31 of the succeeding year. * * * No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this title or any law of the United States or of any State regulating traffic in liquor. * * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued, and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of

any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture.

SEC. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commis-

sioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided.

SEC. 11. All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale, and only to persons having permits to purchase in such quantities.

SEC. 12. All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating the name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon. * * *

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. * * *

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the pro-

visions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Sec. 28

SEC. 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance; but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or

sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

*Title III.*

SEC. 2. Any person now producing alcohol shall, within thirty days after the passage of this act, make application to the commissioner for registration of his industrial alcohol plant, and as soon thereafter as practicable the premises shall be bonded and permit may issue for the operation of such plant; and any person hereafter establishing a plant for the production of alcohol shall likewise before operation make application, file bond, and receive permit.

SEC. 3. Warehouses for the storage and distribution of alcohol to be used exclusively for other than beverage purposes may be established upon filing of application and bond, and issuance of permit at such places, either in connection with the manufacturing plant or elsewhere, as the commissioner may determine; and the entry and storage of alcohol therein and the withdrawals of alcohol therefrom shall be made in such containers and by such means as the commissioner by regulation may prescribe.

SEC. 4. Alcohol produced at any registered industrial alcohol plant or stored in any bonded warehouse may be transferred under regulations to any other registered industrial alcohol plant or bonded warehouse for any lawful purpose.

SEC. 5. Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all

alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereto belonging or in any wise appertaining.

SEC. 7. Any distillery or bonded warehouse heretofore legally established may, upon filing application and bond and the granting of permit, be operated as an industrial alcohol plant or bonded warehouse under the provisions of this title and regulations made thereunder.

SEC. 8. Alcohol may be produced at any industrial alcohol plant established under the provisions of this title, from any raw materials or by any processes suitable for the production of alcohol, and, under regulations, may be used at any industrial alcohol plant or bonded warehouse or sold or disposed of for any lawful purpose, as in this act provided.

SEC. 9. Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from the provisions of sections 3154, 3244, 3258, 3259, 3260, 3263, 3264, 3266, 3267, 3268, 3269, 3271, 3273, 3274, 3275, 3279, 3280, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3302, 3303, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, and 3327 of the Revised Statutes; sections 48 to 60, inclusive, and sections 62 and 67 of the act of August 27, 1894 (Twenty-eighth Statutes, pages 563 to 568), and from such other provisions of existing laws relating to distilleries and bonded warehouses as may, by regulations, be declared inapplicable to industrial alcohol plants and bonded warehouses established under this act.

Regulations may be made embodying any provision of the sections above enumerated.

SEC. 12. The penalties provided in this title shall be in addition to any penalties provided in title 2 of this act, unless expressly otherwise therein provided.

SEC. 15. Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

SEC. 18. All administrative provisions of internal-revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure and forfeiture of property, are made applicable to this title in so far as they are not inconsistent with the provisions thereof.

SEC. 19. All prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

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# No. 523

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THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

BOZE YEGLMOVICH AND COUSIN, BOZE YUGINOVICH, DEFENDANTS IN ERROR.

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## BRIEF FOR DEFENDANTS IN ERROR.

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AUTHORITIES CITED.

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1920.**

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## No.

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THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

*v.*

BOZE YUGINOVICH AND COUSIN BOZE YUGINOVICH, DEFENDANTS IN ERROR.

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## BRIEF FOR DEFENDANTS IN ERROR.

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This is a writ of error to the District Court of the United States for the District of Oregon. The defendants in error, who were also the defendants below, were indicted on four counts for violations of the Internal Revenue Laws. The first count alleged a violation of section 3257 of the Revised Statutes in defrauding and attempting to defraud the United States of the tax on spirits distilled by these defendants. The second count alleged a violation of section 3279 of the Revised Statutes in failing to display the sign "Registered

Distillery" in a distillery run by these defendants. The third count alleged a violation of section 3281 of the Revised Statutes in carrying on the business of distillers without having given the bond required by law. And the fourth count alleged a violation of section 3282 of the Revised Statutes in making a mash in a place other than a duly authorized distillery.

The defendants demurred to the indictment and moved to quash it, which motion was, after hearing by the court, allowed and the demurrer was sustained. The court held that the sections of the Revised Statutes governing the liquor traffic were repealed by the Eighteenth Amendment and the National Prohibition Act and that hence the indictment charged no offense against the United States.

In none of these counts is it alleged that the acts were for the production of intoxicating liquors for beverage purposes, nevertheless the case was presented and decided upon the theory and assumption that the acts done were in violation of the Eighteenth Amendment and the provisions of the National Prohibition Act. This is shown by the failure of the indictment to allege that the distilling was of liquor for non-beverage purposes.

Hence all argument herein is addressed to the proposition that the internal revenue laws did not and do not apply to the acts alleged to have been committed by the defendants.

When reference is hereinafter made to the Revised Statutes, it will mean those sections thereof which contain the provisions of the internal revenue laws applicable to the manufacture of intoxicating liquor for lawful use—*i. e.*, medicinal and non-beverage use.

## POINT I.

**Sections 3257, 3279, 3281, and 3282 of the Revised Statutes are contrary to the United States Constitution as amended by the Eighteenth Amendment.**

The sections of the Revised Statutes above named and under which the defendants have been indicted are a portion of the internal revenue laws of the United States and were enacted originally in the year 1868 (sec. 3257, act of March 31, 1868; sec. 3279, act of July 20, 1868; sec. 3281, act of July 20, 1868; sec. 3282, act of July 20, 1868).

There have been subsequent amendments, but no one of these sections has been amended for the past thirty to forty years and no change has been made in them since the Eighteenth Amendment to the Constitution went into effect. As passed and carried on the Statute Books their purpose was to aid in the collection of the revenue of the United States which was imposed by other sections of the same internal revenue laws enacted at the same time.

U. S. Revised Statutes, sec. 3141.

U. S. *v.* Hill, 123 U. S., 681, 686.

This court has held that the revenue laws are for the purpose of aiding the collection of the Government revenue and taxes.

U. S. *v.* Hill, 123 U. S., 681, 686.

U. S. *v.* Howell, 20 Fed., 718, 719.

Hutton *v.* Terrill, 255 Fed., 860, 862.

It is thus clearly to be seen that these sections are not penal statutes intended to punish a violation of a statute or the

Constitution, but are mere means to assure the payment of taxes imposed in other sections of the same acts upon lawful and constitutional enterprises.

In speaking of the revenue laws, the court said, in Edwards *v.* Wabash Ry. Co., 264 Fed., 610 (C. C. A., 2d Cir.), at page 617: "Statutes of this kind are not remedial laws, nor are they founded on any permanent public policy. They impose burdens on the public and restrict the pursuit of occupations and the enjoyment of property."

The constitutional policy of the United States on the liquor question is now shown by the Eighteenth Amendment, and these taxing statutes passed fifty years ago cannot be continued in opposition to that constitutional policy.

In the License Tax cases, 5 Wall., 462, this court held (p. 474) that the requirement of payment for licenses under the internal revenue laws was only a mode of imposing taxes on the licensed business, and that the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of the tax. This rule is reiterated in Knowlton *v.* Moore, 178 U. S., 41, 61. Under these decisions, therefore, this indictment charges these defendants with the offense of not paying a tax to procure a license to carry on the business of distillers of intoxicating liquors to be used for beverage purposes—a business expressly prohibited by the terms of the Constitution itself.

The power to lay and collect taxes is given to Congress by article I, section 8 of the Constitution.

This power is not unlimited, but must be exercised by Congress, like all the other powers, in accordance with the terms of that instrument. It provides that "manufacture, sale, or transportation of intoxicating liquors within, the importation

thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

U. S. Constitution, article 18, sec. 1.

It is axiomatic that the taxing power of Congress is limited by the provisions of the Constitution from which the Congress derives the power to tax at all.

It has been held that "Subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all the usual objects of taxation" (Knowlton *v.* Moore, 178 U. S., 41, 58), and it is to be noted that two limitations are imposed—*i. e.*, that the power is subject to the limitations of the Constitution and that it extends to only the usual objects of taxation. The converse of this proposition must also be true, namely, that the power of taxation cannot be extended to other than usual objects of taxation—certainly not to acts prohibited by the Constitution itself.

The acts for which a tax is sought to be imposed and collected from the defendants (in that they are indicted for violation of statutes in aid of the collection of the tax) are acts forbidden by the Constitution and made criminal acts by a statute passed to carry into effect the constitutional provision and which act provides exclusive punishments for violation thereof.

This court has never passed directly upon the proposition of laying a tax upon crime and in fact expressly refused to pass upon that question in a case in which the question was not directly before it. It did, however, state (License Tax cases, *supra,* at page 469): "It is not necessary to decide whether or not Congress may, in any case, draw revenue by

law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature." We submit that it is a fundamental principle of morality and justice, no less than an indispensable requirement of a sound public policy, that Congress cannot lay a tax and attempt to collect a revenue from an act that is forbidden by the Constitution of the United States.

The court is respectfully reminded that we are dealing with taxing statutes passed in accordance with the power of Congress to lay and collect taxes, and that there is not before it any statute in its nature penal or passed to secure the enforcement of the constitutional amendment.

There is a line of cases in the various State courts which state broadly that a tax may be levied upon a prohibited business, but a reading of these cases will show that in each instance the tax sought to be collected was imposed on a business which was lawful in some parts of the State but forbidden or prohibited by local ordinance or statute. These cases are all local-option cases. It is also respectfully called to the attention of the court that the statutes in some of these cases were plainly stated to be preventive and not revenue statutes. In no case was there an attempt to *tax for revenue an act prohibited by the Constitution of the State or of the United States.*

It is also in point at this time to call attention to the fact that the powers of Congress and of the State legislatures differ.

Congress and the Federal Government have such powers as

are delegated to them by the Federal Constitution and no more.

The State legislatures have all the powers not taken from them by the Federal and State constitutions; hence it might be that a State legislature could tax for revenue a crime if there were no prohibition in the Federal or State Constitution, but the Congress cannot do so unless given the power.

In only one jurisdiction has a similar question to that in the case at bar arisen. This is in the case of Peo. *v.* Raynes, 3 Cal., 366. The action was brought to recover the license fee for a gaming license. A State statute forbidding gambling had been passed, but apparently had not resulted in abolishing the evil. The State legislature then passed a statute, intended to derive a revenue from an evil that could not be abolished, providing for a license of and a tax upon gaming-houses. Both statutes were passed *by the same authority*—*i. e.*, the State legislature—and both were *State-wide* in their operation. The court, in dismissing the suit, held that an action would not lie for a tax upon a crime and that such a tax cannot be levied.

It is significant that in the California case just cited the taxing statute was passed subsequent to the criminal statute, and hence might have been held to indicate a change in public policy; while in the case at bar the taxing statute was passed long before the constitutional amendment prohibiting the act theretofore taxed and making that act criminal.

An article the manufacture of which is prohibited by the Federal Constitution stands in a different relation to the taxing power of Congress from an article the manufacture of which is prohibited by a statute passed pursuant to the legislative power vested in Congress.

Congress may tax anything that is one of the usual subjects of taxation, and it may provide that until the tax is paid it is unlawful to have any connection with the subject-matter taxed; but this is not because the subject-matter is tainted with crime or illegality in itself, but because Congress under its constitutional taxing and legislative powers has decided to make use of the subject-matter for the purpose of raising revenue and has made it unlawful to practice or pursue a business that is lawful in and of itself until a tax is paid for a license to practice or pursue it.

The tax once paid pursuant to law, the business or other subject-matter taxed becomes entirely lawful, so far as the Federal power of licensing it is concerned.

Before the Eighteenth Amendment became part of the Federal Constitution the liquor traffic was a lawful occupation so far as Federal authority was concerned, but it was unlawful to have any connection with that traffic until the taxes levied thereon were paid; but when the Eighteenth Amendment became part of the Federal Constitution the liquor traffic became illegal and Congress can no longer license and tax that traffic.

Since Congress no longer has the power to levy the tax, the statutes imposing that tax are *ipso facto* repealed and sections of the Revised Statutes here under discussion, having been enacted solely by virtue of the power of Congress to lay and collect taxes, were repealed by the passage of the Eighteenth Amendment since they are contrary to the provisions of the Federal Constitution.

The attempt to recreate the power to tax liquor destroyed by the Eighteenth Amendment by the saving clauses of the National Prohibition Act is abortive.

Under section 5 of title I of the National Prohibition Act "all the power for the enforcement of the War Time Prohibition Act * * * which is conferred by law for the enforcement of existing laws relating to the manufacture * * * of intoxicating liquors" are conferred on all officers of the United States.

The power of enforcement here conferred has reference only to the governmental agencies in existence at the time the revenue laws affecting liquor were repealed and destroyed by the Eighteenth Amendment, such as the police agents employed in the Internal Revenue Department, the Federal courts, and their processes and proceedings. But the law to be enforced by this machinery was the War Time Prohibition Act and not the statutes designed and enacted for the purpose of deriving revenue from an industry prohibited by the terms of the Constitution itself.

By section 28 of title II of the National Prohibition Act "all the power and protection in the enforcement of this act * * * which is conferred by law for the enforcement of existing laws relating to the manufacture * * * of intoxicating liquors" is conferred on all officers of the United States.

Again what is conferred here is the power to use existing governmental agencies formerly used to enforce laws now repealed. The intent of Congress is clear; it simply turns over to the proper officers to enforce the new law the machinery built up in enforcing the prior law or laws, and this fact in itself is an indication of the legislative intent to repeal existing laws designed to enforce payment of a tax.

Section 35 of title II of the National Prohibition Act furnishes no authority for holding that the revenue laws affect-

ing the manufacture of intoxicating liquors are not repealed by the constitutional provision.

All that section 35 does is to provide that its enactment "shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." Such liquor is liquor the manufacture and sale of which is provided for by the sentence next preceding, wherein reference is made to certain regulations provided in the act itself for the manufacture and traffic in intoxicating liquors. But these regulations refer solely to the manufacture of liquor for non-beverage purposes and wine for sacramental purposes. And, as has been pointed out, these defendants are charged with manufacturing liquor for *beverage* purposes—an act expressly forbidden by a constitutional provision.

Section 35 of the act provides that "all provisions of law that are inconsistent" with the National Prohibition Act are repealed, and this language must be held to expressly repeal the sections of the Revised Statutes here in question, because those sections provide for a license for and a tax on the manufacture of that kind of liquor the manufacture of which is forbidden by the terms of the act itself, and, hence, are provisions of law "inconsistent" with the National Prohibition Act.

That is to say, a tax may be imposed and is imposed by the National Prohibition Act on the manufacture of intoxicating liquor for non-beverage purposes, and the amount of the tax thus imposed on such lawful manufacture for medicinal purposes is the amount fixed by the appropriate sections of the internal revenue laws.

The provisions of the National Prohibition Act are the

ones violated by manufacturing liquor for other than non-beverage, medicinal, or sacramental purposes, not the provisions of the internal revenue laws. The internal revenue laws were passed for the express purpose of making the manufacture of intoxicating liquor for beverage purposes legal *after* the tax was paid.

It would be highly inconsistent to tax a person for a license to do something he is forbidden to do by law, and that would be the case here if these defendants were tried and convicted of the offense of not paying a tax to secure the right to do something they could not lawfully do in any event.

U. S. *v.* Wyndham, 264 Fed., 376.

U. S. *v.* Yuginni, 266 Fed., 746.

It is necessary in this connection to differentiate between a tax and a penalty. As has been pointed out, the violation of the sections of the Revised Statutes here in question were enacted to penalize a person who avoided payment of a tax. Since the Government can no longer impose the tax, certainly there can be no punishment meted out for not paying it.

And when Congress seeks to superimpose upon the punishment for violation of the National Prohibition Act the additional punishment it heretofore had imposed for violation of the Internal Revenue Act, it clearly has exceeded its powers and infringed the constitutional rights of citizens under article V and article CI of the Constitution.

There is nothing in the National Prohibition Act that indicates in the slightest degree that it was the legislative intent to continue the internal revenue tax on the manufacture of intoxicating liquor for beverage purposes. To the contrary,

the intention to destroy the traffic in liquor for beverage pu
poses is clearly expressed. How, then, can it be held tha
laws passed with the intent and design of legalizing and co
trolling that traffic are consistent with the act?

If the revenue statutes are not consistent, then they a
inconsistent and expressly repealed by the terms of sectio
35 of the act—at least as far as those laws act on liquor-mak
ing for beverage purposes, and that is the offense and the on
offense with which these defendants are charged under th
indictment.

## POINT II.

**The sections of the Revised Statutes relating to intox
cating liquors were repealed by the National Prohibitio
Act.**

The sections of the Revised Statutes here under discussio
were first passed fifty years ago and were continued in effe
and from time to time added to and amended as required b
the interpretations given them and the changing circum
stances of the Nation. But during this period, extending
the adoption of the Eighteenth Amendment, the policy
the Federal Government toward the liquor traffic remaine
the same. It was a legal and proper business, but it was co
sidered a legitimate source of taxation (as any other leg
business may be), and it was taxed for the purpose of raisi
revenue to carry on the Government. The business w
not in itself illegal or prohibited, although to aid in the co
lection of the revenue it was illegal and prohibited to carry
on without paying the tax and securing a license as eviden
of the payment of the tax. But with the passage and ado

tion of the Eighteenth Amendment the public policy of the Nation changed and the liquor traffic became *in itself* an illegal and improper business. It was henceforth *mala prohibita*. It is now illegal to engage in it, with or without paying the tax and with or without securing a license, and in fact no license would be issued if a request were made for it. And in furtherance of this changed public policy and in enforcement of the constitutional provision the National Prohibition Act (act of October 28, 1919), commonly known as the Volstead Act, was passed.

This act purported to cover the entire field of intoxicating liquors, both for beverage and non-beverage purposes, and states in its title that it is "An act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

It was intended to provide a complete system, in and of itself, for the regulation of intoxicating liquors for beverage and non-beverage purposes. If it did not cover every conceivable situation it is no worse than many another statute that has had that same fault and that has from time to time been amended to meet the exigencies as they arise. The important point is that the Volstead Act was intended and did attempt to meet all situations and to lay down a complete program.

Under these circumstances the well-known rule of implied repeal of statutes must be applied. It is said in 22 Cyc., 1606: "When a later statute is a complete revision of the subject to which the earlier statute related and the new legis-

lation was manifestly intended as a substitute for the former legislation, the prior act must be held to have been repealed." To this same effect see also

U. S. *v.* Ranlett, 172 U. S., 133, 140-1.
Daviess *v.* Fairborn, 44 U. S., 636.
N. J. Steamboat Co. *v.* Pleasanton, 18 Wall., 478.
U. S. *v.* Henderson, 11 Wall., 652, 657.
U. S. *v.* Barr, 24 Fed. Cas., 1016, 1017; Fed. case No. 14527.
U. S. *v.* Cheesman, 25 Fed. Cas., 416; Fed. case 14790.

In the latter case the court said, at page 416: "But the latter embraces the entire subject-matter of the prior act on the subject, making changes on the point in question and adding other provisions, and was manifestly intended as a substitute for it. In such cases it is well settled that the operation of the later act is to repeal the one for which it is substituted. Murdock *v.* City of Memphis, 20 Wall. (87 U. S.), 617; U. S. *v.* Tynen, 11 Wall. (78 U. S.), 88; Henderson's Tobacco, *id.*, 652; Bartlett *v.* King, 12 Mass., 537; Com. *v.* Cooley, 10 Pick., 37; Pierpont *v.* Crouch, 10 Cal., 315; Sedg. St. & Const. Law, 126; Butler *v.* Russell (case No. 2243); Morris *v.* Crocker, 13 How. (54 U. S.), 438."

In the case of Rogers *v.* Nashville, C. & St. L. Ry. Co., 8 Fed., 299 (C. C. A., 6th Cir., opinion by Lurton, J., concurred in by Taft, J., and Severens, J.), the rule is excellently set forth at page 323: "Undoubtedly the general rule is that when there are two acts upon the same subject effect should be given to both, if possible. This is impossible, if the acts are repugnant in any of their provisions. The new law must, therefore, operate as a repeal of the old law, without

regard to a repealing clause, to the ext[illegible] the repugnancy. Neither is it always essential that th[illegible]ll be an express repugnancy between the new and old sta[illegible]es. If the latter law covers the whole field embraced by the earlier act, and includes any new legislation tending clearly to indicate that the new statute was intended to take the place of the first act, it will be treated as repealing by implication the older provisions on the same subject. It will not be presumed that the legislature intended two distinct enactments on the same subject; Suth. St. Const., secs. 154-156. In U. S. *v.* Tynen, 11 Wall., 88, 92, Mr. Justice Field said: 'Where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' To the same effect are Pierpont *v.* Crouch, 10 Cal., 315; Schneider *v.* Staples, 66 Wis., 167; 28 N. W., 145; Com. *v.* Cooley, 10 Pick., 37; Druggists' cases, 85 Tenn., 450; 3 S. W., 490; Poe *v.* State, 85 Tenn., 495; 3 S. W., 658."

In addition to the inconsistency and the repugnancy between the Volstead Act and the Revised Statutes, as set forth above, in the public policy which prompted the enactments, the nature of the two statutes must be considered. The Volstead Act is a penal, regulatory, and prohibitive statute. The Revised Statutes are tax and revenue statutes pure and simple. Therefore there is a basic repugnancy that cannot be overcome, and even the attempted saving clause in the Volstead Act is not sufficient to prevent the application of the well-settled rules of law.

The Volstead Act also comes within the rule that a statute covering the whole subject-matter of a former one, adding

offenses and varying the procedure, operates, not cumula tively, but by way of substitution, and impliedly repeals th former.

U. S. *v.* Claflin, 97 U. S., 546, 551.
Norris *v.* Crocker, 13 How., 429, 438.

In the former case, at page 551, this court adopted and ap proved the rulings in Mitchell *v.* Brown, 1 Ell. & Ell., 267 *Ex parte* Baker, 2 Hurls. & N., 219, and Parry *v.* Croydo Gas. Co., 15 C. B. (N. S.), 568. That the Volstead Ac adds offenses and varies the procedure there can be n dispute.

In this connection the rule of clemency has application A subsequent statute imposing milder penalties impliedly re peals any former act on the subject.

Smith *v.* State, 1 Stew. (Ala.), 506.
State *v.* Whitworth, 8 Port. (Ala.), 434.
Peo. *v.* Tisdale, 57 Cal., 104.
Hayes *v.* State, 55 Ind., 99.
U. S. *v.* Windham, 264 Fed., 376.

As stated in the latter case, in every instance the penaltie for violations set forth in the Volstead Act are not as sever as those contained in the Revised Statutes.

Section 3257 of the Revised Statutes carries a penalty forfeiture of distillery, all apparatus, and all raw material together with a fine of not less than $500 nor more tha $5,000 and imprisonment for not less than six months n more than three years. Section 3279 provides for a fine $500 for failure to post the sign "Registered Distillery Section 3281 provides for a fine of not less than $1,000 n

more than $5,000 and imprisonment for not less than six months nor more than two years. Section 3282 provides for forfeiture and a fine of not less than $500 nor more than $5,000 and imprisonment for not less than six months nor more than two years.

Section 29 of the Volstead Act (act of October 28, 1919) provides for a fine of not more than $1,000 or imprisonment for not more than six months in the case of a first offender manufacturing or selling liquor in violation of the act, and also sets a general penalty for all violations not specifically provided for of a fine of not more than $500 on first offense. No minimum is set for the fines, and a fine and imprisonment together, as provided in the Revised Statutes, are not imposed for any first offense. A distillery is declared to be a common nuisance and may be enjoined (secs. 21 and 22) and upon conviction of maintaining such nuisance a fine of not more than $1,000 or imprisonment for not more than one year or both may be imposed. But imprisonment and fine are not required and need not be imposed. These penal sections of the Volstead Act cover the field and would apply to the acts committed by the defendants in the instant case were they indicted under the Volstead Act. Hence the Volstead Act, imposing lighter penalties for the same offenses, must be held to repeal the Revised Statutes.

The Volstead Act is inconsistent with and repugnant to the sections of the Revised Statutes dealing with the liquor traffic in the fundamental and basic public policy which gave rise to each enactment, in that it is a later statute covering the entire subject-matter and in that it imposes lighter penalties for the same offenses, and hence it must be held to repeal the sections of the Revised Statutes.

## POINT III.

**It is respectfully urged that the judgment of the court below should be affirmed.**

Respectfully submitted,

WALTER JEFFREYS CARLIN.

RANSOM H. GILLETT.

(3166)